B.

Jurisdictional Statement

(a) The statutory provisions which sustain the jurisdiction of the Supreme Court are as follows:

1. Section 75 (n) of the Bankruptcy Act provides that in proceedings under the Section, except as otherwise provided, "the jurisdiction and powers of the courts, the title powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered." (49 Stat. 942, chap. 792; 11 U. S. C. A., Sec. 203.) Section 75(s) provides that "either party may * * * take appeals * * *." (identical).

2. Section 24 (c) of the Bankruptcy Act vests this Court "with jurisdiction to review judgments, decrees and orders of the Circuit Court of Appeals of the United States" in proceedings under the Act in accordance "with the provisions of the laws of the United States now in force or such as hereafter be enacted." (Act of 1898, as amended by Act of May 27, 1926, and Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854; 11 U. S. C. A. Sec. 47.)

The provisions of Section 24 are applicable to proceedings under Section 75. *Raentsch v. American Co.*, (9th C. C. A.) 82 Fed. (2nd) 770.

3. Section 240 of the Judicial Code, as amended, provides for certiorari from this Court to any Circuit Court of Appeals in any case, civil or criminal. (Act of June 7, 1934, c. 426, 48 Stat. 926; 28 U. S. C. A., Sec. 347.)

(b) Section 75(n), the validity of which is challenged by petitioner, if it be construed as contended by the Court of Appeals for the Firth Circuit, reads as follows:

> "The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under Section 75 of this Act, as amended (this section), shall immediately subject the farmer and all of his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, including all real or personal property, or any equity or right in any such property, including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, the right or the equity of redemption where the period of redemption has not or had not expired, or where a deed of trust has been given as security, or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.
>
> "In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the

period necessary for the purpose of carrying out the provisions of this section."

(49 Stat. 942, c. 792; 11 U. S. C. A., Sec. 203.)

(c) Section 75(s), the validity of which is challenged by Petitioner, if it be construed as contended by the Circuit Court of Appeals for the Fifth Circuit, reads as follows:

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer, may at the same time, or at the time of the first hearing, petition the Court that all of his property, wherever located whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee, under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title. Such appraisers shall appraise all of the property of the debtor, wherever located, at its then fair and reasonable market value. The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this title: *Provided*, that in proceedings under this section,

either party may file objections, exceptions, and take appeals within four months from the date that the referee approves the appraisal."

C.

The Questions Presented

Both the facts, most of which are given under A above, and two questions were stipulated before the supervising conciliation commissioner and to the District Court:

The two agreed questions were:

(a) Question No. 1—"Does the fact that the creditor, the Republic Insurance Company, held a vendor's lien on the real estate in litigation deprive the debtor of the rights granted by the Frazier-Lemke Act in so far as this specific property is concerned, this taken in connection with the laws of the State of Texas and under the facts above stipulated?"

(b) Question No. 2—"In the event Question No. 1 be answered adversely to the Republic Insurance Company, then does Section 75 (s) 3 entitle the Republic Insurance as a matter of right to have its request for the appointment of trustee and sale of the property granted? (Question subject to the record as above stipulated, said request being made in the alternative)."

Based on the agreed questions, the following additional questions are presented:

(c) Do the provisions of Section 75 (n) and (s) destroy the Texas law with reference to *title* to land situated in Texas?

(d) Did Congress (while having power to legislate with reference to bankruptcy, debts, liens, etc.) have the power under Article I, Section 8, Clause 4 of the Constitution of the United States to enact Sections 75 (n) and (s) if it be construed as repealing or destroying the Texas law, which gives the vendor the superior right to the land until all purchase money is paid and the vendor, holder of the superior title may recover the land? (This feature of the Texas law is unique to Texas. No other state of the United States or any other country has such a rule. Congress either had this in mind and didn't intend for the Farm Debt Relief Act to be unconstitutional when applied to Texas land titles or it did not have it in mind and therefore, did not intend to legislate at all with reference to superior title of vendors in Texas.)

(e) Did Congress have the power under Article I, Section 8, Clause 4 of the Constitution of the United States to enact Section 75(n) and (s) if it be construed as giving a Court of bankruptcy jurisdiction over realty and grant to the vendee a moratorium of three years and at the end thereof, permit vendee to take title by paying the appraised value, when the Texas law for the 96 years of its existence as a State has uniformly been that a vendee can never take title to land where an express vendor's lien and the superior title are retained until he had paid the full amount of principal, interest, attorney's fee and all other amounts of purchase money due to vendor?

(f) Can the Frazier-Lemke Act (which undoubtedly can relieve the debtor from personal liability for his debts and can scale down debts to the value of the security in Texas or any other state where ordinary mortgages are involved) valid and constitutionally in Texas take from the vendor the *superior title* and transfer same to the vendee without his paying in full for the land?

(g) Does the holding and judgment of the Circuit Court of Appeals deprive the holder of the Superior title of his property without due process of law as guaranteed by the Fifth Amendment?

(h) Are the United States Courts in bankruptcy matters required to follow the Texas law of real estate and title to land as they are required to follow the Texas law and administer same as if they were sitting as a State Court in every case except bankruptcy cases?

(i) Are the United States Courts required to follow the Texas law that discharge in bankruptcy does not affect the superior title and that the holder thereof may recover the land not paid for in full?

(j) Does Section 75 (s) (3) permit the Petitioner to have a trustee appointed and the land sold according to the plain language thereof or must Petitioner wait three years?

D.

Reasons Relied on for Allowance of Writ

Petitioner submits the following reasons why the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reviewed by this Court.

1. The Circuit Court of Appeals for the Fifth Circuit has decided an important question of local Texas law in conflict with the applicable Texas decisions by the highest court of Texas in that the Texas Courts hold that even a discharge in bankruptcy will not affect the superior title of the vendor nor prevent the exercise of his rights and that the very plea of bankruptcy is a repudiation by the vendee of the contract under which he holds and immediately terminates all of his rights. *Bothwell v. Farmers and Merchants State Bank and Trust Co. of Rusk, Texas,* (on rehearing) Commission of Appeals of the Supreme Court, 125 Texas 488, 84 S. W. (2) 229.

2. The Circuit Court of Appeals for the Fifth Circuit has rendered a decision in conflict with its own decisions. *Burton et al, v. Dumestre,* (C. C. A. 5) 86 Fed. (2d), 947; *Hare, et al vs. Henderson, et al,* (C. C. A. 5), 113 Fed. (2) 277.

3. The Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way probably (Petitioner says absolutely) in conflict with applicable local decisions. 66 C. J. 1217, "Vendor and Purchaser", parts of Secs. 1078 and 1079, 27 Ruling Case

Law, "Vendor and Purchaser", Sec. 376—recovery of possession in general, page 622. *Urban v. Bagby*, 286 S. W. 519, 291 S. W. 537; *Browning v. Estes*, 3 Texas 462, 11 Texas 237; *Farmers Loan and Trust Co. v. Beckley*, 93 Tex. 267, 54 S. W. 1027 and the cases cited p. 28 to 32 of Petitioners brief.

4. In holding that—"The superior title is an invention of Texas law to prevent a purchaser of land owing for it under a vendor's lien from keeping the land without paying for it."—The Circuit Court of Appeals has correctly stated the Texas rule except for the use of the word "invention" if that word is used to mean that it is an invention to defeat some Federal law since the rule, peculiar to Texas, has been in existence since 1846, before there was any Federal Bankruptcy law. If the Texas law is: That a vendor's lien and superior title retained are not the same as an ordinary mortgage (Texas also has ordinary mortgages), then the Circuit Court has refused to follow the Texas law and the Federal rule that the United States Court will follow the State law as expressed in the following cases:

In *De Cordova v. Hood*, 84 U. S. 1, 17 Wall. 1, 21 L. Ed. 587, where a vendor's lien was involved the United States Supreme Court followed the Texas Law.

In *Slaughter v. Glenn*, 98 U. S. 242, 8 Otto 242, 25 Law Ed. 122, a case from Texas, it was held that in controversies concerning title to lands, the courts of the United

States would administer the law of the case in all respects as if they were sitting as a state court in the state where the land was situated. The court cited and followed *Olcott v. Bynum*, 17 Wall. 44, 21 Law Ed. 570.

The law of the state in which is situated the land concerning which the action is brought will be followed by the Supreme Court of the United States. *Davis v. Mason*, 1 Peters 503, 7 Law Ed. 239; *Caldwell v. Carrington*, 9 Peters 86, 9 Law Ed. 60; *Taylor v. Drowne*, 5 Cranch 233, 3 Law Ed. 88.

Where the construction given by the highest court of a state to a statute has been uniform and settled, it is binding on the Courts of the United States as a rule of decision especially involving the title to land, *Polk v. Wendel*, 9 Cranch 87, Law Ed. 665.

The rule uniformly applied by the Supreme Court of the United States from the beginning that the courts of the United States would administer the law relating to real estate as it was pronounced by the courts of the state in which the land was situated, has now become the rule of decision as to local controversies and over all matters which are of a local nature. *Erie Ry. Co. v. Tompkins*, 304 U. S. 64, 58 Sup. Ct. 817, 82 Law Ed. 1188; *Klaxon Company v. Stentor E. Mfg. Co.*, 313 U. S. 487, 85 Law Ed. 1477; *J. Rob Griffin v. McCoach*, 313 U. S. 498, 85 Law Ed. 1481.

The rule has been applied by the Circuit Courts in Bankruptcy cases. *Glenn v. Hollums et ux. Glenn v. Eaves et ux.*

(C. C. A. 5), 80 F. (2d) 555; *In re Braker, Hyde Park Lumber Co. v. West Norwood Bldg. & Loan Co. et al,* (C. C. A. 6) 127, F. (2d) 652, at 654; and by the Supreme Court: *State Bank of Hardingsburg v. Brown,* No. 23, Oct. Term, 1942, Nov. 16, 1942, 87 L. Ed. 119.

There can be no shadow of a doubt that the courts of Texas on the facts of this case would award Republic Insurance Company a judgment for possession of the land involved on its superior title.

5. The rule in Texas established in 1846 and followed without deviation to this date, should not be designated as an "invention" of Texas law to defeat Petitioner herein when such rule as to superior titles is peculiar to Texas, and where the rule was established immediately after Texas's admission to the Union, because peculiar to Texas also was the retention by Texas of all of its public domain under the joint resolution of the Congress of the United States for annexing Texas to the United States approved June 23rd, 1845, extract from said joint resolution being found in Article 5415 R. C. S. of Texas, as follows:

> "To bring the provisions of law relating to the public domain together, the following extract is made from the joint resolution of the Congress of the United States for annexing Texas to the United States, approved June 23, 1845; 'Said State, when admitted into the Union, * * * * shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of debts and liabilities of said Republic of Texas, and the residue of said lands,

after discharging said debts and liabilities, to be disposed of as said State may direct,' etc."

See also 34 Texas Jurisprudence, "Public Lands", Sec. 4—"Ownership of Public Lands in Texas in General", page 21.

6. Moratorium statutes, in effect, the same as the three year moratorium or stay provision of the Amended Frazier Lemke Act has been held unconstitutional by the Supreme Court of Texas. See *Travelers Ins. Co. et al, v. Marshall, et al*, 76 S. W. (2d), 1007; 124 Tex. 45; 96 A. L. R. 802, striking down Emergency Moratorium Law, acts 1934, 43rd Legislature, second called session, Chapter 16 R. C. S. Art. 2218b; *Dallas Joint Stock Land Bank vs. Phillips*, 124 Tex. 106, 76 S. W. (2d) 1038; *Williams vs. Wray*, 124 Tex. 105, 76 S. W. (2d) 1039; *Broussard v. Paggi*, 124 Tex. 110, 76 S. W. (2d) 1041; *Dallas Joint Stock Land Bank of Dallas v. Watkins*, 124 Tex. 111, 76 S. W. (2d) 1042. Also held unconstitutional by the Supreme Court of Texas, was the anti-deficiency judgment law, Chapter 92, General Laws, Regular Session of the 43rd Legislature (Vernon's Annotated Civil Statutes—Arts. 2218, 2218a). *Langever vs. Miller*, 76 S. W. (2d) 1025, 124 Tex. p. 80. While Congress may not be inhibited by the Constitution from impairing the obligations of Texas contracts, the United States Courts nevertheless are bound to follow the local law with reference to titles to local real estate.

7. If the Frazier-Lemke Act is construed so as to deprive Petitioner of its rights under the Texas Law, then it is unconstitutional for all of the five reasons stated by the Supreme Court in striking down the original act in *Louisville Joint Stock Land Bank v. William Radford*, 295 U. S. 554, 79 L. Ed. 1593, under the Kentucky law, and for the additional reasons under the Texas law:

> 6. Under the fundamental law of Texas, when land is sold and the vendor retains a lien in the deed to secure the payment of the purchase money, such also reserves in the grantor the superior title to the land, and if the purchase money be not paid, the vendor can sue for the title to and possession of the land and the only defense thereto would be the payment of the entire debt, principal, interest and attorney's fees.
>
> 7. Under the fundamental law of Texas, the retention in the vendor of the purchase money lien and of the superior title has the effect to keep the purchaser from ever obtaining the superior title until all of the debt, principal, interest and attorney's fees is paid, and while a Federal Bankruptcy Act can have the effect of scaling down a debt, it cannot and does not have the effect of permitting the debtor to secure the complete title unless he first pays all of the indebtedness.

Thus the Circuit Court of Appeals for the Fifth Circuit has construed Sections 75 (n) and (s) in such manner as to

render them unconstitutional in each of the following particulars:

a. It has divested property rights vested under the State law or has created property rights not existing in a power not given by Article 1, Section 8, Clause 4 of the Constitution.

b. It has taken Petitioner's property without due process of law in contravention of the fifth amendment of the Constitution.

c. There is an invasion of the powers reserved to the State of Texas by the 10th Amendment with resulting violation of the property rights of Petitioner as theretofore determined by the law of Texas.

8. The Circuit Court of Appeals held that Petitioner is not entitled to an immediate sale of the land as provided in Sec. 75(s) 3 viz:

> "* * * * Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction * * *";

and refused to follow the direction of this Court in *Wright v. Union Central Life Ins. Co.* 311 U. S. 273, 85 L. Ed. 184, the land in this case already having been appraised and Respondent having failed and refused to redeem at the appraised value, a public sale was mandatory.

WHEREFORE, your Pettiioner prays that a Writ of Certiorari be issued out of and under the seal of this Hon-

orable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify to this Court for its review and determination, on a day certain to be named therein, all proceedings in the case numbered and entitled on its docket No. 10,122, *Republic Insurance Company, Appellant vs. U. R. Butts, Appellee*, and that the judgment of said Court may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your Petitioner will ever pray.

REPUBLIC INSURANCE COMPANY,
Petitioner.

By J. L. SHOOK,
Attorney for Petitioner.